



Legal Update

May 2017

The SJC holds that the side yard of a multi-family home was part of the curtilage of the home and that the police unlawfully seized a sawed off shot gun from that area without a warrant!

Commonwealth v. Bobby Leslie, SJC No. 12176 (2017): The Supreme Judicial Court

- (1) applied the United States Supreme Court's ruling in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), that a single-family dwelling's front porch was a "constitutionally protected area," to find that the front porch and side yard of a multi-family dwelling was such a protected area; and
- (2) adopted the Supreme Court's four-factor test announced in *United States v. Dunn*, 480 U.S. 294 (1987), to determine whether an area searched by police was within the home's curtilage, and thereby a constitutionally protected area.

In May 2014, Boston Police Detective Daniel Griffin was driving an unmarked vehicle in a Dorchester neighborhood, when he observed a group of four men suspiciously walking towards a residence on Everton Street.

The residence was a three-family home that had a fence on the front and left side. A chain link fence, with an attached gate at the walkway leading to the sidewalk, stretched across the edge of the front yard. A tall wooden fence ran along the left side of the property, creating a side yard that was five-to-six feet wide between the fence and the house and front porch. A large, blue recycling bin obstructed the view of the left side of the porch from Everton Street.

Detective Griffin watched the men enter the front gate of the residence and meet one of the defendants, Lacy Price, on the porch. Another defendant, Bobby Leslie walked off the front porch, swiveling his head from side to side. Although Griffin's view was obstructed, he could see Leslie crouch down and appear to manipulate something **under the side porch**. Griffin could not see what object Leslie was manipulating. However, Griffin's experience with one hundred or more prior firearm arrests led him to believe that Leslie's actions of crouching down and swiveling his head as he approached **the side porch area** were consistent with an individual who illegally possessed a firearm.

Detective Griffin observed Lacy Price walk to **the side porch**, swivel his head, bend down, and **look under the porch** before returning to the group on the front porch. Leslie returned to **the side porch** area two more times, each time swiveling his head before, bending down, and manipulating something on the ground. On Leslie's third trip to the area, he stood back up after having bent down, and made a gesture that Detective Griffin described as imitating the firing of a shotgun or rifle in the air. Leslie raised his hands and forearms near his shoulders, with one hand near the trigger area, as he simulated recoil.

Detective Griffin suspected that a firearm was hidden under the porch. Griffin and several officers walked through the front gate and proceeded to the front porch. Seven officers approached the men on the porch and began to engage them in conversation. **Griffin veered off the walkway and walked to the left side of the yard, where Leslie and Price previously had gone.** He saw a sawed-off shotgun on the ground under the porch. The wooden handle of the shotgun protruded out from under the porch. **Although the shotgun was not visible from the street or from the gate near the sidewalk, it was plainly visible if one entered the left side of the yard and walked behind the recycling bin.**

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

Detective Griffin arrested Leslie for unlawful possession of a sawed-off shotgun. The police arrested Price in connection with the weapon. Price lived at the residence in the second-floor apartment, but police did not know whether he owned the residence or whether he resided there as a tenant.

Both Price and Leslie were indicted on various firearms charges and they filed a motion to suppress, which the Superior Court allowed. The Single Justice of the SJC allowed the Commonwealth's application for interlocutory appeal. The SJC subsequently allowed the defendant's application for direct appellate review to clarify how the Supreme Court's ruling in *Florida v. Jardines* applies to searching the area adjacent to a multi-family home.

Conclusion: The SJC concluded that the police violated the warrant requirement of the 4th amendment when they recovered the sawed-off shotgun as a result of an unlawful physical intrusion into the curtilage of the residence. The SJC did not determine whether the police had probable cause and exigent circumstances justifying their warrantless entrance onto the constitutionally protected area because the Commonwealth failed to raise that argument at the motion hearing in the Superior Court.

1st Issue: Was the side yard of the multi-family house part of the curtilage of the defendant's home?

The SJC concluded that the porch and side yard area at the residence were part of the home's curtilage and thus entitled to protection against unreasonable search and seizure pursuant to both the Fourth Amendment and art. 14.

Before making this determination, the SJC reviewed the Supreme Court's ruling in *Jardines*. In *Jardines*, the Supreme Court reasoned that the police could lawfully approach the porch that was part of the dwelling's curtilage, but that the police exceeded the scope of their implied license to enter the defendant's property when they brought a drug sniffing dog to the porch to conduct a search for drugs.

The SJC declined to limit the *Jardines* holding to single-family homes or "to fashion a rule categorically excluding areas associated with multi-family homes as curtilage and thus placing them beyond the reach of the protections of the Fourth Amendment and art. 14." The SJC found that the validity of the search involving a multi-family home does not turn on the defendant's exclusive control or expectation of privacy in the area searched. If the SJC distinguished the *Jardines* holding based on the differences

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between the front porch of a stand-alone house and the closed hallways of an apartment building, it would draw arbitrary lines. Moreover, “a strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity.” “The teaching of *Jardines* is that when the search is in or about a person’s home, the essential question is whether the area searched is within the home or its curtilage.”

The Supreme Court has not directly addressed whether porches and side yards of a multi-family home are within the constitutionally protected curtilage. The SJC relied upon the four-factor test announced in *United States v. Dunn* to determine whether, in the multi-family home and apartment context, a particularly described area is curtilage.

In *Dunn*, the Supreme Court introduced a **four-factor test** to determine whether an area searched was within the home’s curtilage:

- (i) the proximity of the area claimed to be curtilage to the home;
- (ii) whether the area is included within an enclosure surrounding the home;
- (iii) the nature of the uses to which the area is put; and
- (iv) the steps taken by the resident to protect the area from observation by people passing by.

The SJC applied the four factors as follows:

i. Proximity: With regards to proximity, the porch in this case was physically connected to the home itself, and as the Court in *Jardines* noted, “[t]he front porch is the classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’” Although the sawed-off shotgun was found under the porch area, the side yard was very close in proximity to the porch and, by extension, the house.

ii. Enclosure: The front yard was enclosed with a chain link fence and the left border of the front yard was enclosed with a large wooden fence about five to six feet away from the porch where the sawed-off shotgun was recovered. Additionally, the chain link fence enclosed both the house and the porch area, allowing the inference that the porch and side yard “should be treated as an adjunct to the house.” As the Supreme Court noted, “for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage -- as the area around the home to which the activity of home life extends -- is a familiar one easily understood from our daily experience.”

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iii. Nature of use: The defendants were using the porch as an extension of Price's home. Price waited for his guests on the porch as they arrived, and the five men were on the porch and in the front yard for the entirety of the visit. Although there was no evidence of Price's exclusive use of the porch and side yard, it was merely a single factor considered in conjunction with the other factors. On balance, the nature of Price's use of the porch and side yard allowed the inference that those areas were intimately connected to his home.

iv. Steps taken to protect the area from observation: Steps were clearly taken to obscure the view of the side yard and the area under the porch where the sawed-off shotgun was found. A large, blue recycling bin was placed in front of the area, which obstructed the view from the street. Additionally, the large wooden fence obscured the view of the area from the left side of the yard where the sawed-off shotgun was found. **Although Detective Griffin testified that the fence in the front yard did not obstruct his view completely, his testimony established that he could not see what Leslie was manipulating under the porch because his view from the street was obscured.**

Based on all these factors, the SJC held that the porch and side yard area at the residence were part of the home's curtilage and thus were entitled to Fourth Amendment and art. 14 protections against unreasonable search and seizure.

The SJC emphasized that the *Dunn* factors are only relevant when determining whether a challenged police action occurring within the boundaries of a home - a "constitutionally protected area" - complies with the Fourth Amendment's protections.

2nd Issue: Did the police exceed the scope of the search when they entered the side yard to look for a weapon without a warrant?

The SJC held that Detective Griffin exceeded the scope of the search when he searched the side yard of the residence without a warrant. Griffin and the other officers were entitled to open the front gate, walk up the path and onto the porch, and engage Price and his guests in conversation. **When the police veered off the path into the side yard of the home to search for a weapon, they exceed the scope and purpose of their visit.** Similar to *Jardines*, where police exceeded the scope of their license when they used a drug-sniffing dog to search the front porch for drugs, here **Detective Griffin had neither express nor implied license to search the side yard and porch area.** See *Jardines* at 1417 ("their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do").

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